

**ITEM \_\_\_\_**  
**DRAFT STAFF ANALYSIS**  
**PROPOSED PARAMETERS AND GUIDELINES**  
***Reconsideration of Handicapped and Disabled Students (04-RL-4282-10)***  
(Reconsideration Directed By Statutes 2004, Chapter 493, Section 7  
(Sen. Bill No. 1895)  
**and**  
**PROPOSED ORDER TO SET ASIDE**  
**PARAMETERS AND GUIDELINES**  
***Handicapped and Disabled Students (CSM 4282)***

Government Code Sections 7570-7588  
Statutes 1984, Chapter 1747 (Assem. Bill No. 3632);  
Statutes 1985, Chapter 1274 (Assem. Bill No. 882)  
California Code of Regulations,<sup>1</sup> Title 2, Sections 60000-60610 (Emergency Regulations  
filed December 31, 1985, designated effective January 1, 1986 (Register 86, No. 1)  
and refiled June 30, 1986, designated effective July 12, 1986 (Register 86, No. 28))

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**Executive Summary**

TO BE COMPLETED FOR FINAL STAFF ANALYSIS

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<sup>1</sup> When the test claim was originally filed, the California Code of Regulations was known as the California Administrative Code.

## DRAFT STAFF ANALYSIS

### Chronology

- 07/30/87      *Handicapped and Disabled Students* test claim (CSM 4282) filed by County of Santa Clara
- 04/26/90      Commission adopts Statement of Decision in *Handicapped and Disabled Students* (CSM 4282)
- 08/22/91      Commission adopts Parameters and Guidelines in *Handicapped and Disabled Students* (CSM 4282); Reimbursement period begins July 1, 1986
- 08/29/96      Commission adopts amended Parameters and Guidelines in *Handicapped and Disabled Students* (CSM 4282)
- 09/13/04      Statutes 2004, chapter 493 (Sen. Bill No. 1895) becomes effective and requires the Commission to reconsider *Handicapped and Disabled Students* (CSM 4282)
- 05/26/05      Commission reconsiders *Handicapped and Disabled Students* (CSM 4282) and adopts Statement of Decision on Reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10)
- 05/26/05      Commission adopts Statement of Decision in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49)
- 06/27/05      County of Stanislaus submits proposed consolidated parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282; 04-RL-4282-10), *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) and *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05)
- 09/28/05      Pre-hearing conference conducted
- 10/07/05      County of Los Angeles files comments and draft parameters and guidelines (04-RL-4282-10)
- 12/09/05      Commission adopts parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49)
- 12/--/05      Staff issues draft staff analysis, proposed parameters and guidelines, and order to set aside the parameters and guidelines for *Handicapped and Disabled Students* (CSM 4282).

### Summary of the Mandate

In 1990, the Commission on State Mandates (Commission) adopted a Statement of Decision approving the *Handicapped and Disabled Students* test claim (CSM 4282) as a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. The *Handicapped and Disabled Students* program was enacted in 1984 and 1985 as the state's response to federal legislation (Individuals with Disabilities Education Act, or IDEA) that guaranteed to disabled pupils, including those with mental health needs, the right to receive a free and appropriate public education,

including psychological and other mental health services, designed to meet the pupil's unique educational needs. The legislation shifted to counties the responsibility and funding of mental health services required by a pupil's individualized education plan (IEP). Parameters and guidelines were adopted in 1991, and amended in 1996, and have a reimbursement period beginning July 1, 1986.

Statutes 2004, chapter 493 (Sen. Bill No. 1895) directs the Commission to reconsider its prior final decision and parameters and guidelines on the *Handicapped and Disabled Students* program (CSM 4282). Section 7 of the bill states the following:

Notwithstanding any other law, the Commission on State Mandates shall, on or before December 31, 2005, reconsider its decision relating to included services and administrative and travel costs associated with services provided pursuant to Chapter 26.5 (commencing with Section 7570) of Division 7 of Title 1 of the Government Code, and the parameters and guidelines for calculating the state reimbursements for these costs.

On May 26, 2005, the Commission adopted a Statement of Decision on reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10). The Commission found that the 1990 Statement of Decision in *Handicapped and Disabled Students* correctly concluded that the test claim legislation imposes a reimbursable state-mandated program on counties pursuant to article XIII B, section 6 of the California Constitution. The Commission determined, however, that the 1990 Statement of Decision does not fully identify all of the activities mandated by the statutes and regulations pled in the test claim or the offsetting revenue applicable to the claim. Thus, the Commission, on reconsideration, identified the activities expressly required by the test claim legislation and the offsetting revenue that must be identified and deducted from the costs claimed. The Commission's Statement of Decision on reconsideration has a period of reimbursement beginning July 1, 2004.

The Counties of Los Angeles and Stanislaus propose that the Commission amend the existing parameters and guidelines in *Handicapped and Disabled Students* (CSM 4282) to reflect the Commission's decision on reconsideration.<sup>2</sup> Staff finds that the Counties' proposal may result in parameters and guidelines that are vague and ambiguous. The existing parameters and guidelines do not reflect the statutory language of Government Code sections 7570 et seq., or the regulations adopted by the Departments of Mental Health and Education, both of which the Commission found, on reconsideration, to impose a reimbursable state-mandated program. In addition, an amended document would contain two separate reimbursement periods to reflect the original reimbursement period of July 1, 1986, and the reimbursement period for the Commission's decision on reconsideration of July 1, 2004.

Thus, staff recommends that the Commission set aside the existing parameters and guidelines in *Handicapped and Disabled Students* (CSM 4282), effective July 1, 2004. Staff further recommends that the Commission adopt new parameters and guidelines for

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<sup>2</sup> See Exhibit \_\_\_\_.

the decision on reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10), with a reimbursement period beginning July 1, 2004.

#### Other Related Parameters and Guidelines

In addition to the Statements of Decision adopted by the Commission in CSM 4282 and 04-RL-4282-10, two other Statements of Decision on the Handicapped and Disabled Students program have been adopted. They include *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05) and *Handicapped and Disabled Students II* (02-TC-40/02-TC-49). The Commission's decision in *Seriously Emotionally Disturbed Pupils* addresses the counties' responsibilities for out-of-state placement of seriously emotionally disturbed students and has a reimbursement period beginning January 1, 1997. The Commission's decision in *Handicapped and Disabled Students II* addresses the statutory and regulatory amendments to the program and has a reimbursement period beginning July 1, 2001.

Staff originally proposed to present consolidated parameters and guidelines to the Commission that included all Statements of Decision addressing the Handicapped and Disabled Students program. Due to the complexity of the program, however, staff recommends that the Commission first adopt separate Parameters and Guidelines for the reconsideration of *Handicapped and Disabled Students* (04-RL-4282-10) and for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49). Thereafter, staff will propose the consolidation of the parameters and guidelines for the Handicapped and Disabled Students program, including *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05), into a single document for claims filed in future years, beginning with the costs incurred in fiscal year 2006-2007.

Reimbursement claims filed under these proposed parameters and guidelines should exclude reimbursable costs included in claims previously filed, beginning in fiscal year 2004-2005, for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) or *Seriously Emotionally Disturbed (SED) Pupils; Out-of-State Mental Health Services* (97-TC-05).

In addition, pursuant to a request of the State Controller's Office, language was added to the parameters and guidelines, which states that "estimated and actual claims filed for fiscal years 2004-2005 and 2005-2006 pursuant to the parameters and guidelines and claiming instructions for Handicapped and Disabled Students (CSM 4282) shall be re-filed under these parameters and guidelines."<sup>3</sup>

#### **Discussion**

The parties have raised the following issues:

- Whether certain activities constitute reasonable methods of complying with the mandated activities and are, therefore, reimbursable.
- Whether Statutes 2005, chapter 78 (Sen. Bill No. 68), effective July 19, 2005, should be identified as an offset for purposes of this test claim.

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<sup>3</sup> See pages 2 and 3 of the Proposed Parameters and Guidelines.

- Whether the county match of funds for Medi-Cal should be excluded from the Medi-Cal offset determined by the Commission to be identified and deducted from the costs claimed.

In addition, appropriations made in the State Budget Act of 2005 were added to section VII of the parameters and guidelines, “Offsetting Savings and Reimbursements.”

### **Reimbursable Activities**

The County of Los Angeles requests that certain activities, not expressly mandated by the test claim legislation, that are related to the initial assessment of the pupil, the mental health services provided to the pupil, and the due process hearings be reimbursable as reasonable methods of complying with the mandated program.<sup>4</sup> These activities are discussed below.

### **Initial Assessment of a Pupil**

The Commission’s Statement of Decision includes the following reimbursable state-mandated activities relating to the initial assessment of a pupil:

2. Perform an initial assessment of a pupil referred by the local educational agency, and discuss assessment results with the parents and IEP team (Gov. Code, § 7572, Cal. Code Regs., tit. 2, § 60040)
  - Review the following educational information of a pupil referred to the county by a local educational agency for an assessment: a copy of the assessment reports completed in accordance with Education Code section 56327, current and relevant behavior observations of the pupil in a variety of educational and natural settings, a report prepared by personnel that provided “specialized” counseling and guidance services to the pupil and, when appropriate, an explanation why such counseling and guidance will not meet the needs of the pupil.
  - If necessary, observe the pupil in the school environment to determine if mental health assessments are needed.
  - If mental health assessments are deemed necessary by the county, develop a mental health assessment plan and obtain the parent’s written informed consent for the assessment.
  - Assess the pupil within the time required by Education Code section 56344.
  - If a mental health assessment cannot be completed within the time limits, provide notice to the IEP team administrator or designee no later than 15 days before the scheduled IEP meeting.
  - Prepare and provide to the IEP team, and the parent or guardian, a written assessment report in accordance with Education Code section 56327. The report shall include the following information:

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<sup>4</sup> California Code of Regulations, section 1183.1

whether the pupil may need special education and related services; the basis for making the determination; the relevant behavior noted during the observation of the pupil in the appropriate setting; the relationship of that behavior to the pupil's academic and social functioning; the educationally relevant health and development, and medical findings, if any; for pupils with learning disabilities, whether there is such a discrepancy between achievement and ability that it cannot be corrected without special education and related services; a determination concerning the effects of environmental, cultural, or economic disadvantage, where appropriate; and the need for specialized services, materials, equipment for pupils with low incidence disabilities.

- Review and discuss the county recommendation with the parent and the appropriate members of the IEP team before the IEP team meeting.
- In cases where the local education agency refers a pupil to the county for an assessment, attend the IEP meeting if requested by the parent.
- Review independent assessments of a pupil obtained by the parent.
- Following review of the independent assessment, discuss the recommendation with the parent and with the IEP team before the meeting of the IEP team.
- In cases where the parent has obtained an independent assessment, attend the IEP team meeting if requested.

Page 31 of the Statement of Decision, footnote 90, recognizes that the existing parameters and guidelines allow reimbursement for mental health assessments and include within that activity the interview with the child and the family, and collateral interviews, as necessary. These activities are not expressly required by the test claim legislation. However, the Commission has the authority when adopting parameters and guidelines to include activities that are considered “the most reasonable methods of complying with the mandate.”<sup>5</sup>

The County of Los Angeles, in its draft parameters and guidelines, requests reimbursement to interview the child and family, and to conduct collateral interviews as necessary.<sup>6</sup> Staff agrees.

As recognized on page 30 of the Statement of Decision, federal law, through the IDEA, requires the state to *identify*, locate, and evaluate *all* children with disabilities, including children attending private schools, who are in need of special education and related services.<sup>7</sup> The state is also required by federal law to conduct a full and individual initial evaluation to determine whether a child is a child with a qualifying disability and the

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<sup>5</sup> California Code of Regulations, title 2, section 1183.1, subdivision (a)(1)(A)(4).

<sup>6</sup> Exhibit \_\_\_\_, page 3.

<sup>7</sup> 20 United States Code section 1412, subdivision (a)(3).

educational needs of the child.<sup>8</sup> Government Code section 7572, subdivision (a), is consistent with federal law and requires that a child shall be assessed in all areas related to the suspected handicap by those qualified to make a determination of the child's need for the service. In cases where the pupil is suspected of needing mental health services, the state has delegated to the counties the activity of determining the need for service.

Therefore, staff finds that the activities of interviewing the pupil and the family, and conducting collateral interviews, when the county determines these activities are necessary to perform the mandated activity of assessing the pupil constitute reasonable methods of complying with the mandated program.

#### Providing Psychotherapy or Other Mental Health Services

The Commission's Statement of Decision authorizes reimbursement for providing psychotherapy or other mental health services identified in a pupil's IEP, as defined in sections 542 and 543 of the Department of Mental Health regulations. As noted in the Statement of Decision, however, the original definition of the types of services was repealed and replaced by the Departments of Mental Health and Education in 1998.<sup>9</sup> The Commission concluded that the new definition of psychological and other mental health services constitutes a reimbursable new program or higher level of service in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49) and, in December 2005, the Commission adopted parameters and guidelines for *Handicapped and Disabled Students II*. The reimbursement period for *Handicapped and Disabled Students II* begins July 1, 2001.

Therefore, costs incurred by eligible claimants for the activity of providing psychological and other mental health services may be claimed pursuant to the parameters and guidelines in *Handicapped and Disabled Students II* (02-TC-40/02-TC-49), beginning July 1, 2001. Since the proposed parameters and guidelines for the reconsideration of the original *Handicapped and Disabled Students* program (04-RL-4282-10) has a later reimbursement period, the activity is not included in these proposed parameters and guidelines.

#### Participation in Due Process Hearings

The Commission's Statement of Decision contains a finding that Government Code section 7586 and section 60550 of the regulations adopted by the Departments of Mental Health and Education constitute a reimbursable state-mandated program by requiring counties to participate in due process hearings relating to issues involving mental health assessments or services. Pursuant to Government Code section 7586, resolution of all issues "shall be through the due process hearing process established in Chapter 5 (commencing with Section 56500) of Part 30 of Division 4 of the Education Code."<sup>10</sup>

As noted in the Statement of Decision, the due process hearing procedures identified in Education Code section 56501 allow the parent and the public education agency to

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<sup>8</sup> 20 United States Code section 1414, subdivision (a).

<sup>9</sup> Statement of Decision, pages 38-42.

<sup>10</sup> Statement of Decision, pages 42-43.

initiate the due process hearing procedures when there is a proposal or a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child.<sup>11</sup> The due process hearing rights include the right to a mediation conference pursuant to Education Code section 56503 at any point during the hearing process; the right to examine pupil records; and the right to a fair and impartial administrative hearing at the state level, before a person knowledgeable in the laws governing special education and administrative hearings, under contract with the department, pursuant to Education Code section 56505.<sup>12</sup>

Education Code section 56505, subdivision (e), further affords the parties the right to be accompanied and advised by counsel and by individuals with special knowledge or training relating to the problems of children and youth with disabilities; the right to present evidence, written arguments, and oral arguments; the right to confront, cross-examine, and compel the attendance of witnesses; the right to written findings of fact and decision; the right to be informed by the other parties to the hearing of the issues in dispute; and the right to receive a copy of all documents and a list of witnesses from the opposing party. Section 60550 of the regulations further states that “[E]ach agency which is identified by the Superintendent of Public Instruction or designee as a potentially responsible party and which has been involved in a proposal or refusal to provide a service is responsible for preparing documentation and providing testimony for the hearing officer.”

The County of Los Angeles requests reimbursement for the following activities:

- Attendance and participation in formal mediation conferences.
- Attendance and participation in Due Process hearings conducted by the Office of Administrative Hearings.
- Preparation of witnesses and documentary evidence to be presented at hearings.

Staff agrees that the activities listed above are required by the test claim legislation and are eligible for reimbursement.

The County also requests reimbursement for the following activities the County argues are necessary to comply with the mandated program:

- County counsel fees incurred when representing county mental health agencies in dispute resolution.
- Attendance and participation in information resolution conferences.

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<sup>11</sup> See also, California Code of Regulations, title 2, section 60550.

<sup>12</sup> See also, California Code of Regulations, title 2, section 60550. With regard to mediation, section 60550, subdivision (b), provides that the Superintendent of Public Instruction shall send the state and local agency involved a copy of the hearing request, the name of the assigned mediator, and the date of the mediation meeting in accordance with Education Code section 56503.



- Attendance and participation in pre-hearing status conferences convened by the Office of Administrative Hearings.
- Attendance and participation in settlement conferences convened by the Office of Administrative Hearings.
- Correspondence/responses to motions for dismissal, continuance, and other procedural issues.
- Travel associated with dispute resolution.
- Reimbursement to parents in the form of services, cash, and attorneys fees, when parents prevail in due process hearings and in negotiated settlement agreements that avoid more costly due process hearings.

Staff finds that attendance and participation in informal conferences, pre-hearing conferences, and settlement conferences are part of the due process hearing procedures, and, thus, constitute activities that are reasonably necessary methods of complying with the county's mandated activity of participating in the due process hearings. Staff further finds that preparing correspondence and/or responses to motions on procedural issues are reasonably necessary methods of complying with the due process hearings. Additionally, staff finds that retaining county counsel to represent the county in these hearings, and the attendant costs associated with the retention of county counsel, is reasonably necessary to comply with the mandated activity since the Education Code expressly authorizes the parties to be represented by counsel. (Ed. Code, § 56505.)

However, the proposed parameters and guidelines do not include a separate activity for travel costs since these costs can be claimed under the direct costs of section V of the proposed parameters and guidelines.

Finally, staff finds that reimbursement to parents in the form of cash and attorneys fees when parents prevail in due process hearings and in negotiated settlement agreements is not reimbursable. These costs are not expressly mandated by the test claim legislation, but are incurred as litigation damages resulting from a negotiated settlement by the parties or by an order of a hearing officer. Staff finds that the County's request for damages goes beyond the scope of the Commission's Statement of Decision.

Accordingly, the proposed parameters and guidelines recommend reimbursement for the following activities:

Participate in due process hearings relating to issues involving mental health assessments or services. (Gov. Code, § 7586; Cal. Code Regs., tit. 2, § 60550.) When there is a proposal or a refusal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free, appropriate public education to the child relating to mental health assessments or services, the following activities are eligible for reimbursement:

1. Retaining county counsel to represent the county mental health agency in dispute resolution. The cost of retaining county counsel is reimbursable.

2. Preparation of witnesses and documentary evidence to be presented at hearings.
3. Preparation of correspondence and/or responses to motions for dismissal, continuance, and other procedural issues.
4. Attendance and participation in formal mediation conferences.
5. Attendance and participation in information resolution conferences.
6. Attendance and participation in pre-hearing status conferences convened by the Office of Administrative Hearings.
7. Attendance and participation in settlement conferences convened by the Office of Administrative Hearings.
8. Attendance and participation in Due Process hearings conducted by the Office of Administrative Hearings.

**Statutes 2005, chapter 78 (Sen. Bill No. 68)**

The Commission's Statement of Decision provides that the following activity constitutes a reimbursable state-mandated activity:

Issue payments to providers of out-of-home residential facilities for the residential and non-educational costs of seriously emotionally disturbed pupils. Payments are for the costs of food, clothing, shelter, daily supervision, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. Counties are eligible to be reimbursed for 60 percent of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility. (Gov. Code, § 7581; Cal. Code Regs., tit. 2, § 60200, subd. (e).)<sup>13</sup>

With respect to this activity, the Department of Finance requests that the Commission identify section 36.5 of Statutes 2005, chapter 78 (Sen. Bill No. 68) as an offset in the parameters and guidelines.<sup>14</sup> Section 36.5 of Statutes 2005, chapter 78 added

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<sup>13</sup> Statement of Decision, pages 36-38, 49-50, 56.

<sup>14</sup> This request was made by the Department of Finance in comments filed on the proposed parameters and guidelines for *Handicapped and Disabled Students II* (02-TC-40/02-TC-49). (Exhibit \_\_\_\_.) In the analysis on the proposed parameters and guidelines for *Handicapped and Disabled Students II*, it was noted that the county's 60 percent share of the total residential and non-educational costs of a seriously emotionally disturbed pupil placed in an out-of-home residential facility was found eligible for reimbursement by the Commission in the *Reconsideration of Handicapped and Disabled Students* (04-RL-4282-10), **not** in *Handicapped and Disabled Students II*. Thus, Statutes 2005, chapter 78, which added Welfare and Institutions Code section 18355.5 was not relevant for purposes of *Handicapped and Disabled Students II*, but would be addressed in the parameters and guidelines for the *Reconsideration of Handicapped and Disabled Students* (04-RL-4282-10).

section 18355.5 to the Welfare and Institutions Code, effective July 19, 2005, to provide the following:

Notwithstanding any other provision of law, counties shall not claim reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code for costs of 24-hour out-of-home care for seriously emotionally disturbed children who are placed in accordance with Section 7572.5 of the Government Code, if those costs are claimed by the county under this chapter and the county receives reimbursement for those costs through the Local Revenue Fund established pursuant to Section 17600.

Pursuant to section 18355.5, if a county claims reimbursement under Welfare and Institutions Code section 17600 for the costs of 24 hour out-of-home care for seriously emotionally disturbed pupils and receives the funding, then the county cannot file a separate reimbursement claim with the State Controller's Office for those costs pursuant to the mandate reimbursement procedures in Government Code section 17561. Welfare and Institutions Code section 17600 et seq. was added as part of the realignment legislation enacted by Statutes 1991, chapter 89 to "realign" the state and county fiscal relationship regarding the funding of a number of health and welfare programs, including county mental health treatment services outlined in the Welfare and Institutions Code. In this regard, Welfare and Institutions Code section 17600 creates a Local Revenue Fund, which includes the Sales Tax Account, the Vehicle License Fee Account, the Vehicle License Collection Account, the Sales Tax Growth Account, and the Vehicle License Fee Growth Account.

The Department of Finance states that the purpose of Welfare and Institutions Code section 18355.5 is "to protect the state from having to pay twice for the costs of SED [seriously emotionally disturbed] children, once with State-Local Program Realignment (Realignment) revenues designated for this purpose and then again through the mandate claim process." The Department requests that the following offset language be included in the parameters and guidelines:

Section 36.5 of Chapter 78, Statutes 2005 (SB 68, the Social Services Trailer Bill), which was chaptered on July 19, 2005, adds WIC Section 18355.5 which prohibits counties from claiming as a state mandate, the county's 60 percent share-of-costs for residential placements of SED children, if the county receives reimbursement for those costs from State-Local Program Realignment funds (i.e., the Local Revenue Fund established pursuant to [Welfare and Institutions Code] section 17600.)

The County of Los Angeles contends that the Commission no longer has jurisdiction to consider Welfare and Institutions Code section 18355.5 since the statute was enacted after the Statement of Decision was adopted by the Commission. The County further contends that the Department's concern about double reimbursement should be covered by the boilerplate offset language found in parameters and guidelines. The boilerplate offset language provides that:

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any source, including but not limited to, service fees collected, federal funds and other state funds; and grant monies received by the state and passed through to local agencies, shall be identified and deducted from this claim.

For the reasons below, staff finds that the Commission has jurisdiction to consider Welfare and Institutions Code section 18355.5, as enacted in 2005, for purposes of the parameters and guidelines.

The Commission's Statement of Decision in this case was adopted in May 2005. On page 49 of the decision, there is a finding that counties are not required to fund the cost of any part of the services under the *Handicapped and Disabled Students* program with money received from the Local Revenue Fund established in Welfare and Institutions Code section 17600. This finding was based on Section 38 of Statutes 2002, chapter 1167 (Assem. Bill No. 2781), which stated the following: "For reimbursement claims for services delivered in the 2001-02 fiscal year and thereafter, counties are not required to provide any share of those costs or to fund the cost of any part of these services [required by the test claim legislation] with money received from the Local Revenue Fund established by Chapter 6 (commencing with Section 17600) of Part 5 of Division 9 [of the Welfare and Institutions Code]." The finding was also based on section 6 of Statutes 2004, chapter 493 (Sen. Bill No. 1895), which added section 5701.6 to the Welfare and Institutions Code (as part of the Bronzan-McCorquodale Act) to provide that if the money from the Local Revenue Fund is used by the counties for the *Handicapped and Disabled Students program*, counties "are eligible for reimbursement from the state for all allowable costs to fund assessments, psychotherapy, and other mental health treatment services ..." Since the provisions of Statutes 2002, chapter 1167, and Statutes 2004, chapter 493, were still in effect in May 2005, the Commission determined that *all* of the costs for psychotherapy or other mental health treatment services, including the county's 60 percent share of the residential and non-educational costs of seriously emotionally disturbed pupils, were reimbursable and that realignment funds used by a county for this program were not required to be identified as an offset and deducted from the costs claimed.<sup>15</sup>

Welfare and Institutions Code section 18355.5 became operative on July 19, 2005, two months after the Commission issued its Statement of Decision in this case. Welfare and Institutions Code section 18355.5 conflicts with the Commission's finding that none of the funds received through the Local Revenue Fund in Welfare and Institutions Code section 17600 are counted to offset a county's reimbursement claim for the counties' 60 percent share of the residential and non-educational costs of seriously emotionally disturbed pupils placed in out-of-home residential facilities. Nevertheless, the Commission, for purposes of adopting the parameters and guidelines, has jurisdiction to consider and address this subsequent change in the law.

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<sup>15</sup> See also page 53 of the Statement of Decision.

The California Supreme Court, in *Arakelian Farms, Inc. v. Agricultural Labor Relations Board (ALRB)*, determined that the ALRB had the jurisdiction to reopen the proceedings and reconsider a finding in light of an intervening change in the law since the ALRB's process for considering unfair labor claims was bifurcated.<sup>16</sup> The ALRB divided the process for determining unfair labor claims into the liability phase and the compliance phase, and the intervening change in the law occurred between these phases.<sup>17</sup> The employer petitioned the ALRB to reopen the liability phase of the case and reconsider its order in light of the intervening change in the law. The ALRB refused to reopen the proceedings, citing the rule of res judicata.<sup>18</sup> Res judicata generally bars the re-litigation of issues that were previously resolved in an administrative hearing by an agency acting in a judicial capacity. The policy of res judicata is to prevent repetitious litigation of issues that are finally resolved. The Supreme Court, however, held that the doctrine of res judicata did not apply since the order adopted by the ALRB during the liability stage of the proceedings contemplated further administrative action and, therefore, "the policy underlying the doctrine of res judicata – avoiding repetitious litigation – is not implicated by reopening the proceedings..."<sup>19</sup> The court held that:

Such finality is lacking, and thus the rules of res judicata do not apply, if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination, or if the administrative agency has decided that one party should have relief but the amount of damages, or the form or scope of other relief, remains to be determined.<sup>20</sup>

The court's reasoning and analysis in *Arakelian Farms* applies here. Like the ALRB, the Commission's process for adjudicating claims for reimbursement of state-mandated local costs is bifurcated. At the first stage, the Commission determines the question of law whether the test claim legislation constitutes a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution. If the test claim is approved, the Commission continues to the second stage of the proceedings, the adoption of parameters and guidelines. Government Code section 17557 requires the Commission to adopt parameters and guidelines and determine the amount to be subvended to local agencies for reimbursement. In this case, the Commission was required by Senate Bill 1895 to reconsider the Statement of Decision *and* the parameters and guidelines for the *Handicapped and Disabled Students* program. Even though Welfare and Institutions Code section 18355.5 was enacted after the Commission's Statement of Decision on reconsideration was adopted, the Commission still has jurisdiction, pursuant to Government Code section 17557, Senate Bill 1895, and *Arakelian Farms*, to determine the amount to be subvended with respect to this program

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<sup>16</sup> *Arakelian Farms, Inc. v. Agricultural Labor Relations Board* (1989) 49 Cal.3d 1279, 1291.

<sup>17</sup> *Id.* at page 1289.

<sup>18</sup> *Id.* at page 1288.

<sup>19</sup> *Id.* at page 1290.

<sup>20</sup> *Id.* at pages 1290-1291.

and to consider the effects of Welfare and Institutions Code section 18355.5 on this claim.

Welfare and Institutions Code section 18355.5 states that “[n]otwithstanding any other provision of law,” counties shall not claim reimbursement for 24-hour out-of-home care for seriously emotionally disturbed pupils if the county received reimbursement for those costs from the realignment funds. The Legislature is deemed to be aware of existing statutes, such as Statutes 2002, chapter 1167, and Statutes 2004, chapter 493, when it enacts a new statute, such as Welfare and Institutions Code section 18355.5.<sup>21</sup> The phrase “notwithstanding any other provision of law” has expressly been interpreted by the courts as “an express legislative intent to have the specific statute control despite the existence of other law which might otherwise govern.”<sup>22</sup> Thus, any other provision of law that is contrary or inconsistent with the statute “is subordinated to the latter provision” containing the “notwithstanding” language.<sup>23</sup>

Therefore, beginning July 19, 2005, Welfare and Institutions Code section 18355.5 applies to this claim and prohibits a county from claiming reimbursement for its 60 percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility pursuant to the test claim legislation *if* the county claims reimbursement for these costs from the Local Revenue Fund identified in Welfare and Institutions Code section 17600 and receives reimbursement for those costs. Since Welfare and Institutions Code section 18355.5 limits who can claim reimbursement for this activity, the limiting language has been placed in Section IV, Reimbursable Activities, of the proposed parameters and guidelines. (See page 5 of the proposed parameters and guidelines.)

### **The Medi-Cal Offset**

The Commission’s Statement of Decision states that, to the extent counties obtain proceeds under the Medi-Cal program from either the state or federal governments for purposes of this mandated program, such proceeds must be identified as an offset and deducted from the costs claimed. The Commission determined that federal law authorizes public agencies, with certain limitations, to use public insurance benefits, such as Medi-Cal, to provide or pay for services required under the IDEA.

The County of Stanislaus requests that the counties’ match toward the Medi-Cal funding used for a pupil under this program should not be included as part of the offset. The County requests the following language be included in the offset provision of the parameters and guidelines:

Medi-Cal Federal Financial Participation funds obtained from the State for the purposes of this mandated program in accordance with federal law. Funding received and used by Counties from the State for the purpose of matching federal funding requirements, including Realignment funds,

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<sup>21</sup> *McLaughlin v. State Board of Education* (1999) 75 Cal.App.4th 196, 212.

<sup>22</sup> *People v. Tillman* (1999) 73 Cal.App.4th 771, 784-785.

<sup>23</sup> *Id.* at page 786.

shall be considered local discretionary funding and therefore are not to be identified as an offset or deducted from the costs claimed.

The County supports its language with the following contentions:

The reason for the foregoing is that Medi-Cal reimburses the Federal Financial Participation (FFP) share, which is currently 50% of the allowable costs for eligible students, with counties required to pay the balance.

In many counties, including Stanislaus, County Realignment funds are used to pay the required county match. Realignment funds are state sales tax and vehicle license fees that are allocated to counties to cover their costs for providing mental health services. These funds have been found by the Commission to not constitute offsets to the required expenditures on Handicapped and Disabled Students.

Staff agrees that the counties' share of funding under the Medi-Cal program used for purposes of this mandated program should not be identified as an offset. Under federal law, payment is authorized to the states for medical assistance on behalf of families with dependent children and on behalf of the aged, blind, or disabled individuals whose income and resources are insufficient to meet the costs of necessary medical services. (42 U.S.C. § 1396.) The amount of the federal share of costs for such medical services "shall in no case be less than 50 per centum or more than 83 per centum." (42 U.S.C. § 1396d.) According to the County, the federal share of costs for the state's Medi-Cal program is 50 percent.

Under state law, the state's share of funding for Medi-Cal is split with the counties. Welfare and Institutions Code section 12306 provides that "the state shall pay to each county, from the General Fund and any funds available for that purpose 65 percent of the nonfederal cost of providing services under [the Medi-Cal program], and each county shall pay 35 percent of the nonfederal cost of providing those services."

Article XIII B, section 6 was designed to protect the tax revenues of local governments from state mandates that would require expenditure of such revenues.<sup>24</sup> Thus, the counties' share of funding under the Medi-Cal program used for purposes of this program should not be identified as an offset.

In addition, with the exception of a county's reimbursement of its 60 percent share of the total residential and non-educational costs of a seriously emotionally disturbed child placed in an out-of-home residential facility, if a county uses money from the Local Revenue Fund to fund the local share of Medi-Cal costs used for the *Handicapped and Disabled Students* program, such funds are not required to be identified as an offset and deducted from the costs claimed. The Commission's Statement of Decision concluded, pursuant to Statutes 2004, chapter 493 (Sen. Bill No. 1895), that realignment funds received from the Local Revenue Fund that are used by a county for the *Handicapped and Disabled Students* program are not required to be deducted from the costs claimed.

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<sup>24</sup> *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487.

Thus, Section VII of the proposed parameters and guidelines identifies the offsets as follows:

Any offsetting savings the claimant experiences in the same program as a result of the same statutes or executive orders found to contain the mandate shall be deducted from the costs claimed. In addition, reimbursement for this mandate received from any of the following sources shall be identified and deducted from this claim:

1. Funds received by a county pursuant to Government Code section 7576.5.
2. Any direct payments or categorical funding received from the state that is specifically allocated to any service provided under this program. This includes the appropriation made by the Legislature in the Budget Act of 2001, which appropriated funds to counties in the amounts of \$12,334,000 (Stats. 2001, ch. 106, items 4440-131-0001), the \$69 million appropriations in 2003 and 2004 (Stats. 2003, ch. 157, item 6110-161-0890, provision 17; Stats. 2004, ch. 208, item 6110-161-0890, provision 10), and the \$69 million appropriation in 2005 (Stats. 2005, ch. 38, item 6110-161-0890, provision 9).
3. Funds received and applied to this program from the appropriation made by the Legislature in the Budget Act of 2005 for disbursement by the State Controller's Office, which appropriated \$120 million for costs claimed for fiscal years 2004-2005 and 2005-2006 for the *Handicapped and Disabled Students program* (CSM 4282) and for *Seriously Emotionally Disturbed (SED) Pupils: Out-of-State Mental Health Services* (97-TC-05). (Stats. 2005, ch. 38, item 4440-295-0001, provisions 11 and 12.)
4. Private insurance proceeds obtained with the consent of a parent for purposes of this program.
5. Medi-Cal proceeds obtained from the state or federal government that pay for a portion of the county services provided to a pupil under the Handicapped and Disabled Students program in accordance with federal law.
6. Any other reimbursement received from the federal or state government, or other non-local source.

*Except as expressly provided in section IV(E)(1) of these parameters and guidelines, Realignment funds received from the Local Revenue Fund that are used by a county for this program are not required to be deducted from the costs claimed.*  
(Stats. 2004, ch. 493, § 6 (Sen. Bill No. 1895).)

### **Staff Recommendation**

Staff recommends that the Commission adopt staff's Proposed Parameters and Guidelines, beginning on page \_\_. Staff also recommends that the Commission authorize staff to make any non-substantive, technical corrections to the parameters and guidelines following the hearing.

Staff further recommends that the Commission adopt the Proposed Order to Set Aside the Parameters and Guidelines in *Handicapped and Disabled Students* (CSM 4282) beginning on page \_\_, effective July 1, 2004.